Before the
Federal Communications Commission
Washington, D.C.
20554

In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992 Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act Sunset of Exclusive Contract Prohibition	)))))))))	MB Docket No. 07-29

Reply Comments of SureWest Communications

SureWest Communications ("SureWest"), by its attorney, hereby files these Reply Comments in response to the Commission's Notice of Proposed Rulemaking, FCC 07-07, released February 20, 2007, in the above-captioned proceeding ("*NPRM*"). In its Comments filed on April 2, 2007, SureWest urged the Commission to extend for an additional five years, the Section 628(c)(2) prohibition on exclusive contracts between vertically-integrated programmers and cable operators. SWC also urged the Commission to expand the prohibition to close the "Terrestrial Loophole" in that prohibition, in order to promote and protect competition in the provision of multichannel video programming services. Lastly, SureWest suggested that the Commission should address in this proceeding, exclusive contracts for national sports programming with all MVPDs. In these Reply Comments, SureWest demonstrates that there is substantial evidence in the record supporting these proposals, as well as the proposal of many commenters that the Commission adopt arbitration procedures as a remedy for program access disputes.

I. The Record Supports Extension of the Section 628(c)(2) Prohibition on Exclusive Contracts.

The record demonstrates that vertically-integrated programmers have the incentive and the ability to act in a discriminatory manner towards non-integrated multi-channel video programming distributors ("MVPDs"). Vertically-integrated cable operators generally argue that the growth of competitors to incumbent cable operators undercuts the need for maintaining the Section 628(c)(2) prohibition; yet, as noted by RCN Telecom Services, Inc. ("RCN"), the exact opposite is true:

> The incentive of incumbent operators to use their control over programming to stymie the development of competition has not changed since Congress enacted Section 628 – if anything, this incentive has increased as facilities-based competition has begun to emerge. As the Commission has noted, the larger the number of subscribers controlled by a provider, the larger the benefits of withholding programming from competitors ....[1]

The Commission also recognizes that increased concentration of multiple system operator ("MSO") cable incumbents enhances the incentive and ability of vertically-integrated incumbent cable operators to use program access in a discriminatory manner, because such concentration "increases the buying power of the major MSOs

[1] RCN Comments at page 3, citing, Development of Competition and Diversity in Video Programming Distribution and Carriage, Section 628(c)(5) of the Communications Act: Sunset of Exclusive Contract Prohibition, 17 FCC Rcd 12124 (2002)("*Sunset R&O*") at para. 38. *See also,* Comments of the United States Telecom Association ("USTA") at page 8.

and because it facilitates the ability of the MSOs to coordinate their conduct."[2] Yet, as noted by Verizon (Comments at page 11), since 2002 the four largest MSOs have increased their share of the nation's MVPD subscribers from 48 percent to 53 percent. Furthermore, while the Commission has previously found that the "clustering" of cable systems increases the incentive of MSOs to deny access to vertically integrated programming,[3] in fact there has been a significant increase in clustering since 2002 among the largest MSOs – approximately 80 percent of all cable subscribers are in regional clusters.[4]

In sum, the record shows that based just on the size of the major MSOs and the geographic distribution of their systems, the major MSOs retain the ability and incentive to deny access to vertically-integrated programming. Furthermore, the economic rationale for such discriminatory behavior remains – the Commission continues to recognize that there are certain programming networks that a competitive MVPD must have in order to compete in the market: not only national programming channels such as CNN and TNT, but regional sports networks as well.[5]

---

[2] Implementation of Section 302 of the Telecommunications Act of 1996 – Open Video Systems, Second Report and Order, 11 FCC Rcd 18223, 18322 (1996).

[3] *Sunset R&O* at para. 47.

[4] Comments of USTA at page 10, citing Annual Assessment of Status of Competition in the Market for the Delivery of Video Programming, Twelfth Annual Report, 21 FCC Rcd 2053 (2006)("*Twelfth Annual Report*") at Table B-2.

[5] Comments of USTA at page 14, *citing Twelfth Annual Report*, 21 FCC Rcd at 2622-24, and Applications for Consent to the Assignment and/or Transfer of Control of Licenses – Adelphia Communications Corporation, Assignors, to Time Warner Cable Inc. et. al., 21 FCC Rcd 8203, 8258-59 (2006) ("*Adelphia Transfer Order*").

Commenters such as Comcast and the National Cable and Telecommunications Association ("NCTA") argue that the growth of DBS subscribership since 2002 demonstrates that the MVPD market is so competitive that the prohibition on exclusive programming contracts is not necessary. This argument is fatally flawed in numerous ways. First, the DBS operators rely on the prohibition on exclusive programming contracts in order to provide the "must-have" channels that were necessary for the growth of their subscriber base. Second, regardless of the growth of DBS subscribership, the Commission must consider the beneficial impact of the prohibition on wireline competitors, whose subscribership is much smaller than that of the DBS operators at this time.[6] As demonstrated in the Comments of the Coalition for Competitive Access to Content ("CA2C"), wireline MVPD operators provide the strongest price competition to incumbent cable operators, yet they only serve less than two percent of the nation's MVPD subscribers.[7] These important competitors must be protected from the predatory tactics of discriminatory program access.[8]

Cable MSOs also argue that the growth in the total number of cable programming channels undercuts the need for the prohibition on exclusive contracts. Again, though, this misses the point: while there may be hundreds of possible channels

---

[6] *See, e.g.,* Comments of American Cable Association ("ACA") at page 10 ("In this proceeding, the Commission must focus on those without power, including small and medium-sized cable operators."). *See also,* Comments of SureWest, at note 6.

[7] Comments of CA2C at pages 5 and 7.

[8] *See*, Comments of USTA at pages 18-19 *citing* In the Matter of Time Warner Cable Relating to the Exclusive Distribution of Courtroom Television, Memorandum Opinion and Order, 9 FCC Rcd 3221, 3228 (1994), wherein the Commission stated that it must consider the effect of program exclusivity on all alternate technology competitors, not just on DBS.

for competitors to carry, there is no substitute for the "must-have" channels, many of which are vertically integrated with Cable MSOs. Furthermore, as noted in the Comments (at page 4) of the Broadband Service Providers Association ("BSPA"), the MSOs do not need to control all of the programming channels to adversely impact competition – just selective channels aimed at different demographic markets.

While the record thus shows that cable MSOs retain the incentive and ability to use programming exclusive contracts in an anti-competitive manner, it also shows that the competition promoted by the Section 628 prohibition also promotes the growth of broadband networks. As ACA explains:

> ... operators offering bundled services rely on their video service to increase the profitability of their broadband investment. (citation omitted) The lack of a competitive video offering reduces the attractiveness of the entire bundle and increases the likelihood that the customer will chose another provider for the entire bundle of services. By eliminating Section 628(c)(2)(D), the Commission would impede, rather than promote, investment in broadband deployment.[9]

As noted at pages 2-3 of SureWest's Comments, SureWest is a prime example of this principle. SureWest provides its subscribers one of the most technologically advanced broadband networks in the country, with fiber provisioned all the way to the home, allowing SureWest to offer speeds up to 50 Mbps and to offer broadband Internet service on a synchronous basis,[10] along with robust offerings of voice and video services. However, at the heart of the SureWest business plan behind the construction

---

[9] ACA Comments at page 14. *See also* Comments of CA2C at pages 18-19.

[10] Customers receive up to 50 Mbps for both uploading and downloading.

and operation of this advanced broadband network, is the idea that subscribers will purchase bundles of services, including multichannel video service. Yet, without access to certain must-have channels, SureWest's video offering would be less competitive, and its business model may not be able to survive.

II. The Commission Should Apply the Prohibition to Certain Other Limited Situations.

As shown above, the record clearly demonstrates that the Commission should extend for another five years the Section 628(c)(2) prohibition on exclusive contracts for vertically-integrated satellite cable programming. The record also supports applying that prohibition in certain other limited circumstances.

First, as discussed in Section II of SureWest's comments, the Commission should close the "Terrestrial Loophole" that results from its interpretation of its authority under Section 628(c)(2). Unfortunately, as the Commission well knows, under the Loophole, vertically integrated programmers can evade the prohibition, merely by electing to use a different technology (terrestrial fiber) to distribute programming. This result reduces competition and violates the fundamental intent behind Section 628 – that all MVPDs have the opportunity to acquire vertically integrated programming on a fair and non-discriminatory basis. As shown in SureWest's comments, the Commission has on a number of occasions recognized this problem, but always claimed that it lacks the authority to remedy it. SureWest demonstrated that the Commission's view is overly narrow: it should look to the broad principles stated in the 1992 Cable Act, and the House floor debate on the amendment to the House Bill which ultimately included Section 628 to see that there appeared to be no intent to limit the prohibition as interpreted by the Commission. Furthermore, regardless of the Commission's authority under Section 628(c), the Commission can and should look to Section 628(b), as well as Section 4(i) combined with Section 601(6) to provide it with the authority needed to close the loophole.

SureWest was not alone in urging the Commission to close the Loophole. BSPA asserted that the requirements assuring access to regional sports networks, whether terrestrial-delivered or not, that the Commission has enacted as part of recent cable and DBS merger approvals, should be applied as a general policy matter in all cases.[11] Verizon stated that the Commission "can and should prevent vertically integrated programmers from evading the exclusive contract provision..." and urged the Commission to particularly focus on the shifting of HD feeds of vertically integrated programming to terrestrial delivery.[12] The Rural Independent Competitive Alliance (Comments at pages 4-5) urged the Commission to expand the prohibition to terrestrially delivered programming, and noted that Sections 616(a) and 612(g) of the Act provide authority to the Commission to do so.

It should be noted that in the context of approving the Adelphia/Comcast/Time Warner transaction, the Commission imposed program access conditions that applied "regardless of the means of delivery," *i.e.,* including terrestrial delivery. *Adelphia Transfer Order*, 21 FCC Rcd at 8274. Given that there is nothing unique to that

---

[11] BSPA Comments at page 17.

[12] Comments of Verizon at pages 13-14. Verizon noted that Sections 4(i) and 303(r) of the Act provide authority for the Commission to remedy these issues.

transaction about the incentives and economics of vertical integration of cable programming, the Commission should apply that closing of the Terrestrial Loophole equally to all vertically-integrated cable programmers.

In addition to closing the Terrestrial Loophole, the Commission should, as proposed by RCN and ACA, expand application of the exclusive contract prohibition to programmers that are vertically integrated with all MVPDs, including DBS operators. As ACA noted (Comments at pages 11-13), DBS operators can have the same incentives as major MSOs when it comes to providing access to vertically integrated programming, and was demonstrated recently in the context of the Liberty/DirecTV deal and in Congressional hearings on the DirecTV/MLB “Extra Innings” program package. RCN noted that national and regional sports networks are just as “must-have” as other “must-have” programming previously identified by the Commission, that there is no basis for treating such programming that is vertically integrated with DBS operators any differently than if it is integrated with cable operators, and that accordingly the prohibition should be extended to national and regional sports networks vertically integrated with DBS providers as well as with cable MSOs. RCN Comments at page 17. SureWest supports this approach.

In light of the strong evidence in the record of certain sports programming being “must-have” programming for competitors,[13] SureWest believes that there is great merit to RCN’s proposal that the exclusive programming prohibition be applied to <u>non-</u>

[13] *See, e.g.,* Comments of RCN at page 9 and Note 27. *See also,* Comments of ACA at page 6.

integrated regional and national sports programming, regardless of whether that programming is originally offered to cable operators or other MVPDs. SureWest believes that the Commission has the statutory authority to address this issue, but if the Commission believes otherwise, SureWest urges the Commission to work with Congress to obtain a more explicit grant of such authority.

III. The Records Supports Adoption of Revised Complaint Resolution Procedures.

In paragraphs 14 and 15 of the *NPRM*, the Commission sought comments as to whether the Commission procedures for program access complaints are adequate, and if not, whether they should be modified. In response, the comments strongly support significant modification of those procedures, including revisions to discovery rules, enactment of arbitration procedures, and mandated use of standstill agreements.

As noted by many commenters, Section 628 of the Act gives the Commission broad authority to craft remedies for resolution of program access complaints.[14] Section 628 authorizes the Commission to create "appropriate remedies" including adjudicatory proceedings and expedited reviews. As demonstrated by RCN and BSPA, the Commission has the authority to delegate adjudication of program access complaints to third-party arbitrators.[15] Nothing in the Comments of the cable MSOs disputes these two points.

---

[14] *See, e.g.,* Comments of BSPA at pages 9-10, Comments of USTA at page 20, and Comments of RCN at pages 20-21.

[15] Comments of BSPA at pages 9-10, and Comments of RCN at pages 21.

The fact is that the Commission extensively analyzed the question of the appropriate means of resolving program access disputes most recently in the context of the Hughes/DirecTV and the Adelphia/Comcast/Time Warner transactions. Therein, the Commission recognized that given the economic incentives of vertical program integration and the damage that can be done to competition through discriminatory denial of program access, procedural remedies such as commercial arbitration are necessary to protect the public interest.[16] There is no rational reason why, as a matter of economics and public policy, such arbitration procedures should be limited to programmers that have been though an FCC merger approval process, and accordingly, the Commission should enact arbitration rules that apply generally to all vertically-integrated programmers. The rules proposed in this proceeding by BSPA are based on those already adopted by the Commission in the *Adelphia Transfer Order*, and thus should be a good template for such rules.

SureWest also finds persuasive the arguments made by BSPA (Comments at pages 14-16) and USTA (Comments at pages 27-29) in favor of enactment of mandatory standstill orders in the context of program access complaints where a carriage agreement already exists between the disputing parties. Even temporary denial of programming to a competitor during a programming dispute can be very damaging to competition, regardless of whether the programmer has been through an FCC

[16] *See,e.g.,* In the Matter of General Motors Corporation and Hughes Electronics Corporation, Transferors and The News Corporation, Limited, Transferee, Memorandum Opinion and Order, 19 FCC Rcd 473, 553-555 (2004) ("*Hughes/DirecTV Order*"); *Adelphia Transfer Order,* 21 FCC Rcd at 8253-54.

merger approval proceeding or not. Accordingly, the Commission should enact general standstill requirements similar to those required in the Hughes/DirecTV and the Adelphia/Comcast/Time Warner transactions.

IV. Conclusion

The record demonstrates that the Commission should extend for an additional five years, the Section 628(c)(2) prohibition on exclusive contracts between vertically-integrated programmers and cable operators. The record also supports the Commission expanding the prohibition to close the "Terrestrial Loophole" in that prohibition, in order to promote and protect competition in the provision of multichannel video programming services. In addition, application of the prohibition should be expanded to certain other limited situations, such as programmers that are vertically integrated with MVPDs other than cable operators, and certain non-integrated regional and national sports programming. Lastly, the record supports adopting revised complaint resolution procedures, such as mandatory arbitration and standstill requirements.

Respectfully submitted,

SUREWEST COMMUNICATIONS
By: */s/ Paul J. Feldman*
Paul J. Feldman
Its Attorney

FLETCHER, HEALD & HILDRETH, PLC
1300 North 17th St.
11th Floor
Arlington, Virginia 22209
(703) 812-0400
April 17, 2007